Civil and Administrative Tribunal

New South Wales

Case Name:	Keyworth v The Owners - Strata Plan No. 45081
Medium Neutral Citation:	[2022] NSWCATCD 75
Hearing Date(s):	7-8 April 2022
Date of Orders:	06 May 2022
Decision Date:	6 May 2022
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	1. The application is dismissed. 2. Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 16 May 2022. 3. Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 30 May 2022. 4. Any submissions in reply (not exceeding two pages) are to be filed and served by 6 June 2022. 5. Any such submissions should indicate whether the party accepts that costs should be determined on the papers, ie without the need for a further hearing.
Catchwords:	LAND LAW - Strata title – Whether duty to repair and maintain common property was breached – Whether works authorised by common property rights by-law
Legislation Cited:	Home Building Act 1989 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 Mitchell v Cullingral Pty Ltd [2012] NSWCA 389

	Mullen v Owners Corporation SP 15342 [2017] NSWCATCD 97 Owners SP36613 v Doherty [2021] CATAP 285 Owners Strata Plan No 74698 v Jacinta Investments Pty Ltd [2021] NSWCATAP 387 Ridis v Strata Plan 10308 [2005] NSWCA 246 Riley v The Owners-Strata Plan 73817 [2012] NSWCA 410 Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157 The Owners – Strata Plan No 21702 v Krimbogiannis [2014] NSWCA 411 The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd [2020] NSWCATAP 202 The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd [2016] NSWSC 541 The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207 The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134 The Owners Strata Plan No 74835 v Pullicin; The Owners Strata Plan No 80412 v Vickery [2020] NSWCATAP 5 Thoo v The Owners Strata Plan No. 50276 [2011] NSWSC 657 Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Ian Keyworth (First Applicant) Choong Lin (Second Applicant) The Owners – Strata Plan No. 45081 & 43487 (Respondent)
Representation:	Counsel: G Sirtes SC & M McGirr (First and Second Applicant) J Young (Respondent) Solicitors: Williamson Lawyers (First and Second Applicant) Strata Title Lawyers (Respondent)

File Number(s): SC 21/30130

Publication Restriction: Nil

REASONS FOR DECISION

Outline

1 The strata-titled building which is the subject of this application is about 100 years old. Known as 'The Castle', it is a Sydney Harbour waterfront property in Mosman with six floors and has one lot for each floor. As a result, the words unit and level may be used interchangeably. Lots 7 to 12 in SP 45081correspond to units/levels 1 to 6. Every lot owner is a member of the strata committee, and the scheme is self-managed.

2 As the building is on sloping land, level 4 is street level. The building's façade is masonry and, to a large extent, sandstone. At some point, the eastern façade was renovated with concrete and aluminium framed glazing. In late 2020 and during 2021, masonry spandrels on levels 3, 4, 5 and 6 of the building were removed and drop-down fire curtains were installed on levels 3, 4 and 5.

3 Simply stated, the applicants' case in these proceedings is that such work materially reduced the fire safety, does not comply with the provisions of the Building Code of Australia (BCA), and that work is needed to restore that fire safety by removing those curtains and either reinstalling the spandrels or installing a sprinkler system.

4 After considering the evidence and the submissions, the Tribunal concluded that the subject building work had been authorised and that no breach of the respondent's duty to repair and maintain the common property had been established. As a result, the Tribunal determined that the application should be dismissed.

Hearing

5 At the hearing, which was conducted using audio-visual link (AVL) facilities and telephone lines due to the COVID-19 pandemic, the evidence upon which the parties sought to rely was in a joint tender bundle, comprising seven folders with pages numbered 1-2772.

6 Objection was taken to three documents in that joint tender bundle. The first was the witness statement of Ian Keyworth dated 15 November 2021. There was an objection to the last sentence in [10] which was left to be a matter for submissions. There was also an objection to [30] and annexure F but that paragraph was not pressed with the result that [30] and annexure F have been excluded from the evidence in these proceedings. The effect of that was that the last sentence of [10] bore no weight.

7 The tender of a witness statement of Mr Keyworth dated 11 January 2022 and a supplementary report on wind loads dated 28 January 2022 were rejected. The former statement was said to include a video indicating matters relevant to wind which plainly was intended to provide a factual foundation for the supplementary report. That supplementary report was provided after not only the time for the applicants' evidence to be filed and served but also the conclave which resulted in the joint report.

8 While late service could be excused by reason of the time which the respondent has had to consider the supplementary report, the filing of a report after a joint report has been finalised is not considered acceptable. There was no explanation as to why this evidence was not obtained and provided earlier. Those documents having been rejected, they were removed from the joint tender bundle and marked for identification as MFI 2 and MFI 3 respectively.

9 The lay witnesses were Mr Keyworth and Mr Lin (the applicants), and Mr de Graaf and Mr Luby for the respondent. Mr Keyworth and Mr Luby were cross-examined as were the two experts: Mr Grove for the applicants and Mr Harriman for the respondent. Their joint report is at 3/870 (ie from page 870 within volume 3 in Exhibit 1).

10 Following the oral evidence, which was completed on the first day of the hearing, counsel delivered closing submissions on the second hearing day of with counsel for the applicants filing and serving outline submissions (MFI 4).

11 During the hearing, the following documents were either admitted as evidence or marked for identification:

Exhibit 1 Joint tender bundle – 7 volumes – pages 1-2772

Exhibit 2 19 January 2021 email from Shane Williamson

Exhibit 3 20 January 2021 email from Mr Harriman

Exhibit 4 6 February 2021 email from Mr Harriman

Exhibit 5 External Cladding Report dated 4 May 2021

Exhibit 6 Applicant's chronology

Exhibit 7 Five pages of September 2021 emails to/from Mr Harriman

Exhibit 8 12 April 2021 letter from NSW Fire + Rescue

MFI 1 Chronology

MFI 2 11 January 2022 statement of Mr Keyworth

MFI 3 Supplementary report on wind loads dated 28 January 2022*

MFI 4 Applicant's Outline of Oral Submissions dated 8 April 2022*

* tender rejected

Jurisdiction

12 This application relates to a strata-titled building in Mosman. The subject strata scheme was registered on 4 March 1994. Accordingly, the Tribunal has jurisdiction to determine these proceedings under the *Strata Schemes Management Act* 2015 (SSMA).

Relevant law

13 It is convenient to first consider s 106 of the SSMA which reads as follows:

> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that—
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>
> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably

> foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> (8) This section does not affect any duty or right of the owners corporation under any other law.

14 The application did not make any reference to s 106 of the SSMA. However, the applicants' outline submissions (7/2653) referred to *The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd* [2016] NSWSC 541 (*Walker*) at [42], *The Owners – Strata Plan No 21702 v Krimbogiannis* [2014] NSWCA 411 *(Krimbogiannis*), and *Owners SP36613 v Doherty* [2021] CATAP 285 (*Doherty).*

15 *Walker* was a case in which an owners corporation commenced proceedings against a builder and a developer, alleging defective work in breach of the statutory warranties provided by s 18B(1) of the *Home Building Act* 1989. As to the obligation of an owners corporation to repair and maintain common property, now contained in s 106 of the SSMA but then contained in s 65 of the predecessor statute, the only point made at [42] was that an owners corporation could carry out work pursuant to that obligation and did not require a special resolution for such work.

16 *Krimbiogannis* was said to support the proposition that if a building is not in its authorised state, the owners corporation is bound to restore it to its authorised state. However, that was a case where a lot owner, without authorisation, removed a glass panel, which formed part of an external wall of the building (part of the common property), and replaced in with a glass sliding door.

17 *Doherty* was a case where a balustrade complied with the BCA when the building was constructed but not when subsequent work was undertaken which created a requirement for that balustrade to be upgraded. As was recorded at [56], after inspecting the balustrade, a council officer emailed the strata

manager indicating that action should be taken in relation to the balustrades. As a result, a work order was made.

18 *Doherty* did not alter the position by requiring buildings to comply with the current provisions of the BCA and not the provisions at the time the relevant build work was done because, at [153], it was clearly indicated that: *"Once work was required to be undertaken, that work was required to comply with current regulatory requirements in applicable law, codes and standards."*

19 The respondent's submissions (7/2710) referred to additional cases, namely *Ridis v Strata Plan 10308* [2005] NSWCA 246 (*Ridis*), *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 (*Seiwa*), *Thoo v The Owners Strata Plan No. 50276* [2011] NSWSC 657 (*Thoo*), *Riley v The Owners-Strata Plan 73817* [2012] NSWCA 410 (*Riley*), and *Mullen v Owners Corporation SP 15342* [2017] NSWCATCD 97 (*Mullen*).

20 *Ridis* was a personal injury claim in which negligence was alleged. It was thus a decision as to the common law duty of care which involved in a consideration of the statutory obligation imposed by the then equivalent of s 106. Despite being a 2-1 decision with separate judgements, *Ridis* established that, while the statutory duty imposed by s 106 only required repair and maintenance, it extended beyond physical deterioration in condition or operation if it became obvious, to a point which reasonably required either action or investigation, that there is a safety risk in condition or operation. That must be correct otherwise the word "maintenance" would have no work to do if the obligation under s 106 only covers matters requiring repair.

21 *Seiwa,* at [4], is usually cited in support of the proposition that the duty imposed by s 106 is a strict duty to maintain common property and keep it in repair, not just a duty to use reasonable care or best endeavours.

22 *Thoo,* at [55], suggests that the duty imposed by s 106(1), being to maintain and repair, does not require the complete replacement of common property.

23 *Riley,* another personal injury case, did include a consideration (at [74]-[76]) of *Ridis* and *Seiwa*. It was noted that the majority in *Ridis* did not consider the

duty to maintain and repair imposed an obligation to obtain an assessment by a specialist expert.

24 Although a first instance Tribunal decision, *Mullen* helpfully summarises, at [43], what arises from the decisions in *Ridis*, *Seiwa*, and *Riley*:

> 1. The obligations of maintenance and repair in section 106(1) of the Act are directed to keeping the common property operational, and to restoring something which is defective: *Ridis* at [158];
>
> 2. The duty to maintain the common property under section 106 (1) involves an obligation to keep the common property in proper order by acts of maintenance before it falls out of condition. There is thus a duty not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there will not be a malfunction: *Seiwa* at [4];
>
> 3. As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the section 106 duty: *Seiwa* at [5]; *Riley* at [76];
>
> 4. Section 106 does not oblige an Owners Corporation to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property: *Ridis* at [177] (although it is relevant to bear in mind that in *Ridis* the issue was whether the statutory obligation under section 106 informed a common law duty of care: *Seiwa* at [5]; *Riley* at [75]);
>
> 5. As the duty of an Owners Corporation under section 106(1) is strict it is irrelevant to consider whether the Owners Corporation took all reasonable steps to comply with its duty. It also means that contributory negligence is no defence to an action for breach of statutory duty under section 106(1): *Seiwa* at [21];
>
> 6. In the final analysis the question of whether the duty under section 106 has been breached will depend upon the circumstances of each case. It will be relevant to identify whether the Owners Corporation was aware of any particular danger with regard to any aspect of the common property, whether there had been any earlier problems and whether there was any factor which should have led the Owners Corporation to carry out an inspection regularly or at all: *Ridis* at [187]-[188].

25 Turning to s 108, which is titled "*Duty of owners corporation to maintain and repair property*", the words of that section are reproduced below:

> (1) **Procedure for authorising changes to common property** An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.
>
> (2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.
>
> (3) **Ongoing maintenance** A special resolution under this section that authorises action to be taken in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property

> once the action has been taken is the responsibility of the owners corporation or the owner.
>
> (4) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.
>
> (5) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless-
>
> (a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and
>
> (b) the owners corporation makes the by-law.
>
> (6) The by-law-
>
> (a) may require, for the maintenance of the common property, the payment of money by the owner at specified times or as determined by the owners corporation, and
>
> (b) must not be amended or repealed unless the owners corporation has obtained the written consent of the owner concerned.
>
> (7) Sections 143 (2), 144 (2) and (3) and 145 apply to a by-law made for the purposes of this section in the same way as they apply to a common property rights by-law.

26 The issue in *The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd* [2020] NSWCATAP 202 (*BGT*) was whether a by-law could authorise work on common property without complying with s 108 of the SSMA, since s 108(2) requires a special resolution that "*specifically authorises the taking of the particular action proposed*". At [134] it was noted that the need for a special resolution enables an owners corporation to examine the work and take advice in order to consider any potential dangers.

27 At [148] it was suggested there should be reasonable precision as to the particular common property which is to be the subject of the proposed work.

28 In *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134 (*Veney*) at [31]-[32], after quoting the propositions set out by McColl JA (with whom Mason P agreed) in *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 (*Tate*) at [71], it was said that:

> … it is necessary to consider the language of the by-law, viewed in the statutory context in which it was made; and whilst recourse to surrounding circumstances may be permissible as an aid to construction if necessary, particularly bearing in mind the public purpose of strata by-laws, to exercise

caution in going beyond the language of the by-law itself and its statutory context.

29 Reference was also made to s 232 of the SSMA which is quoted below:

> (1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following-
>
> (a) the operation, administration or management of a strata scheme under this Act,
>
> (b) an agreement authorised or required to be entered into under this Act,
>
> (c) an agreement appointing a strata managing agent or a building manager,
>
> (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,
>
> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
>
> (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.
>
> (2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if-
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.
>
> (3) **Other proceedings and remedies** A person is not entitled-
>
> (a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or
>
> (b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.
>
> (4) **Disputes involving management of part strata parcels** The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if-
>
> (a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or
>
> (b) any of the parties to the dispute fail to consent to its determination by the Tribunal.
>
> (5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

> (6) **Disputes relating to consent to development applications** The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the Environmental Planning and Assessment Act 1979 relating to common property of the scheme.
>
> (7) **Excluded complaints and disputes** This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.

30 Finally, there was reference to s 229 of the SSMA in the applicants' documents but that section does not provide a primary source of power for final relief as it only covers either an ancillary or consequential matter or an interlocutory decision.

Lay evidence

31 Mr Keyworth provided two statements, dated 19 August 2021 (4/890) and 15 November 2021 (6/2421), and was cross-examined. To the extent that those statements refer to and comment on the reports of experts, the relevant aspects of the expert evidence are considered later, noting Mr Keyworth's concession in cross-examination that he was not an expert in building matters.

32 In his first statement, Mr Keyworth indicates that he and Mr Lin have been the owners of unit 2 on level 2 (Lot 8) since May 2012. Mr Keyworth contended that (1) the upgrade work reduces the fire safety of the building, (2) that upgrade work is not in accordance with the BCA, and (3) that special by-law 3 for the strata plan numbered 51914 is invalid. He went through events which are summarised in the chronology set out in Appendix 1.

33 In relation to the Fire Engineering Report (FER) for the upgrade work, Mr Keyworth said his understanding of the FER was that it would require the installation of three additional smoke detectors inside his home, "*for the sole purpose of upgrading unit 3*", which were said to be likely to cause false alarms due to their proximity to the kitchen and require inspections to be conducted twice a year instead of once. He indicated that, on 18 February 2021, he said

he would not pursue legal action if flame detectors were installed externally on level 3 instead of extra smoke detectors inside level 2.

34 The second statement of Mr Keyworth replied to the first statement of Mr Luby.

35 When cross-examined, Mr Keyworth initially suggesting he did not contact NSW Fire + Rescue, as he had said in his first statement at [26]. However, when its 12 April 2021 letter to Mosman Council was put to him, Mr Keyworth accepted that the words in that letter, which quoted from correspondence dated 22 February 2021, were his. His less than convincing explanation was that he had forgotten about that, saying that he completed a form, but his computer screen froze, and he did not know if that communication had been sent.

36 Further, it is also noted that Mr Keyworth asserted there was no agreement reached at the mediation held on 13 January 2021 (4/893 at [23]) but the evidence suggests there was (5/2435). Matters such as these warrant the evidence of Mr Keyworth being treated with caution unless corroborated by contemporaneous documents.

37 Mr Lin provided a statement dated 20 August 2021 (4/1340). He was not cross-examined. He provided details of his qualifications and experience as an architect and annexed a copy of a drawing he prepared in relation to the fire curtains which he indicated was provided to Mr Keyworth to enable it to be sent to a wind engineer.

38 Mr de Graaf, who was not cross-examined, provided an affidavit dated 15 September 2021 (5/1350). He was the superintendent for the building work that comprised repairing concrete spalling (the remedial work) and upgrading the external façade (the upgrade work). This affidavit traced the relevant history of the façade work from 4 November 2020, when a Construction Certificate was issued, through to 3 September 2021 when an Occupation Certificate was issued. Those events are included in the chronology set out in Appendix 1.

39 Mr Luby, who was cross-examined, provided three affidavits: one dated 15 September 2021 (5/2286) and two dated 28 March 2022 (6/2527 and 6/2585). In his first affidavit, Mr Luby indicated that he and his wife are the owners of Lot 12, which is unit 6, on level 6, and that since 2008 he has carried out the roles

of chairman, secretary, and treasurer. The events referred to in this statement have also been included in the chronology set out in Appendix 1.

40 In the first of his two affidavits dated 28 March 2022 (6/2528), Mr Luby responded to the second statement of Mr Keyworth dated 15 November 2021. In the second of those two affidavits (6/2585), Mr Luby provided more recent documents which related to a general meeting held on 26 October 2021 and maintenance of the installed fire safety measures.

41 During his cross-examination, Mr Luby said that the respondent did not deal with Holmes Fire LP (Holmes) as that was dealt with by PD Remedial Pty Limited (PDR) under the design and construct contract. He also said that the respondent relied on experts with specialty knowledge and that his understanding was the Mr Keyworth wanted to have external flame protectors installed instead of additional smoke detectors inside his unit.

42 Mr Luby agreed that the removal of the spandrels gave the owners of lots 3, 4 and 5 an opportunity to maximise their views. He also accepted that levels 4 and 5 have no self-closing doors or self-closing windows.

43 As the sequence of relevant events was covered by a number of witnesses, rather than set out those events in pages of prose, they have been summarised in the chronology which is Appendix 1.

Expert evidence

44 The joint report (1/870) set out the area of agreement in items 1 to 6 and it is convenient to quote the comments of the experts in relation to those items (emphasis original):

> It was agreed that the scope of the Development Consent (**DC**) and Construction Certificate (**CC**) was to remove existing windows, remove the concrete spandrel, replace the windows with larger windows and install fire curtains to units 3, 4 and 5 as alternatives to the existing spandrel panels.
>
> It is agreed that a performance solution (PS) was undertaken by Holmes (**Holmes Report)** and this formed part of the CC approval. It is agreed that the Holmes Report addressed spandrel panels and was limited to non-compliance with clause C2.6 of the BCA only.
>
> It is agreed that Part A of the Building Code of Australia (**BCA**) contains the Governing Requirements which must be complied with. It was also agreed that the Governing Requirements are prescriptive and there is no scope to undertake a PS to Part A of the BCA.

> It is agreed that the existing building was not provided with a sprinkler system, and still isn't, and as such the building did require spandrel panels.
>
> It is agreed that Council must consider the extent of the upgrading required to the building, if any, under clause 94 of the Environmental Planning and Assessment Regulations (**EPAR**) prior to issuing the DC. It is further agreed that the DC did not contain any conditions requiring the building to be upgraded.
>
> It is agreed that under the provisions of clause 142 of the EPAR the certifier must consider whether or not there is a reduction in fire safety and structural capacity of the building prior to issuing the CC. What is not agreed is whether or not this 'test' was met which is discussed in Table 2 below.

45 Table 2, containing items 7 to 12, set out the matters on which Mr Grove and Mr Harriman were unable to agree. Those matters were explored in cross-examination. They are summarised below, together with the Tribunal's assessment of each of those six items. It is convenient to first deal, by way of introduction, some of the matters raised by the expert evidence.

46 The National Construction Code (NCC) contains technical requirements for building work in Australia by including all requirements into a single code. The NCC contains three volumes. The first two volumes are called the Building Code of Australia (BCA): volume 1 primarily relates to multi-residential, commercial, industrial, and public buildings while the focus of volume 2 is residential and non-habitable buildings. Volume 3 contains the Plumbing Code of Australia (PCA). Clause 98 in the EPAR requires compliance with the BCA. That compliance can be achieved by a Performance Solution (PS) and/or a Deemed to Satisfy solution (DtS).

47 The BCA includes fire resistance requirements which are established by a Fire Resistance Level (FRL) which covers three measures of time (in minutes): (1) in respect of a building element: structural adequacy (how long it will remain in place), (2) integrity (how long it will prevent the penetration of fire), and (3) insulation (how long it will stop heat from passing through). Those criteria are measured during a fire test and the applicable Australian standard is AS1530.4.

48 In the evidence, the use of the word spandrel denotes the horizontal material in the area between the head (ie top) of a window and the sill (ie bottom) of the window in the next floor above. On the question of fire safety, the risk which must be considered and addressed is that of a fire on one level of a building

spreading up to the next level of the building, commonly called a flashover. Accordingly, there are requirements for both the height of spandrels and their FRL. As a result, removing spandrels requires steps to be taken to achieve the same level of fire protection.

49 Prior to the building work the subject of these proceedings, there were concrete spandrels extending up from the floor on each of levels 1 to 6. The BCA required those spandrels to be not less than 900mm in height and to extend not less than 600mm above the upper surface of the floor. The spandrels thereby addressed the risk of a flashover by providing protection against a fire spreading into that upper floor.

50 After the removal of those spandrels from levels 3, 4, 5, and 6, drop-down fire curtains were installed at levels 3, 4 and 5. As a result, a spread of fire from levels 1 to 2 was still addressed by concrete spandrels, the spread of fire from levels 2 to 3 was addressed by self-closing doors and windows on level 3, and the spread of fire from levels 3 to 4, from levels 4 to 5 and from levels 5 to 6 was addressed by curtains that would drop down 900 mm. Beyond the self-closing doors and windows on level 3, the fire curtains thereby addressed the risk of a flashover by providing protection against a fire spreading out of the lower floor.

51 Thus, the building work involved a change from a system intended to prevent a flashover by providing an entry barrier on the upper level to a system intended to prevent a flashover by providing an exit barrier on the lower level.

52 Item 7 in the joint report was headed "*Assessment of Sprinklers*". However, the issue raised by this item was the question of whether the application for a Construction Certificate was required to be referred to the fire brigade. The opinion of Mr Grove on that point was based on cl 144(1)(f) of the EPAR. However, the Construction Certificate was issued on 4 November 2020 and that provision did not come into force until 11 December 2020. Prior to that date, cl 144(1) only contained paragraphs (a) to (e). As the certifier noted (4/1128), cl 144(1)(f) does not apply retrospectively. Accordingly, the Tribunal determines there was no requirement to refer the Construction Certificate application to the Fire Brigade.

53 It is noted that, when Mr Keyworth sought to cause a problem by communicating directly with Fire + Rescue on 22 February 2021, that did not result in any action being taken by Fire + Rescue. For convenience, two further matters are here noted. First, Mr Keyworth suggested that the fire curtains may be expected to work in "*up to 2000Pa wind load*". Secondly, having searched the ViPac report (3/529) in vain for that figure, the Tribunal notes that report was amended no less than six times, including changes made in response to what were referred to as "*client comments*".

54 Further, cl C2.6 in the BCA requires spandrel separation unless the builder has sprinkler protection throughout. As a result, spandrels and sprinklers are alternatives. Since the subject building does not have sprinklers, the only relevant performance requirement (PR) is that for spandrels, not sprinklers. Thus, the need for a consideration of the PR of sprinklers (EP 1.4) does not arise: the only relevant PR is that of spandrels (CP 2).

55 Accordingly, the suggestion of Mr Grove, in the joint report at Item 7 (3/875), that an important statutory safeguard was missed is rejected.

56 Item 8 covered the determination of wind pressures. This item does not require separate consideration as the experts dealt with it under the heading of Item 11.

57 Item 9 dealt with the reliability of smoke detectors. Mr Grove, in the joint report (3/876), suggested that "*Based on authoritative studies, smoke detection systems are in the order of 85% reliable*" and claimed that faults with such a detection system would increase the likelihood of curtains whose operation is based on those systems malfunctioning. The following observations are relevant to this item.

58 First, with three smoke detectors, 85% reliability means a 15% chance of failure (about 1 in 6) and the chance of all three failing is 15% of 15% of 15% which is 0.3375% (about 1 in 300). Secondly, when cross-examined, Mr Grove said his 85% figure was based on what appeared in his report. In his report (3/525), Mr Grove suggested 89% to 94%. At 11% the chance of failure with three smoke detectors reduces to 0.1331% (about 1 in 750) and at 6% the figure is 0.0216% (about 1 in 500,000). Thirdly, Mr Grove did not provide any

comparative figure for the reliability of a sprinkler system. Indeed, in answer to the last question on this item in cross-examination, Mr Grove agreed that the failure rate of three smoke detectors was lower than that of a sprinkler system.

59 Further, Mr Grove only provided an extract from the report to which he referred and was unable, in cross-examination, to indicate either the date of that report (suggesting it was 10 to 15 years old) or what period the study covered. He also conceded that, during that period, there has been a change from analogue to digital equipment, and from ionising to photoelectric. Additionally, in the joint report, Mr Grove used the word "*Authoritative studies*" but his report only refers to one such study. Finally, as was noted by Mr Harriman, the Holmes Report required the smoke detectors to be tested every six months, instead of every twelve months as required by the BCA and Australian Standards.

60 Mr Harriman indicated that the three smoke detectors are interlinked (Mr Grove agreed with that) so that if any of them is activated, the magnet holding the fire curtains is deactivated and they are pulled down by gravity.

61 In short, Mr Grove's evidence does not persuade the Tribunal that the reliability of smoke detectors is a factor which provides support for a finding that there has been a reduction in fire safety. Indeed, the evidence of Mr Grove in relation to this item appeared to be advocacy intended to assist the applicants rather than an impartial opinion intended to assist the Tribunal.

62 Item 10 considered the reliability of self-closing doors and windows on level 3. In his comments in the joint report under this item, Mr Grove made the following points: (1) the question of reliability, as with smoke detectors, (2) the need for backup batteries which need to be replaced every 12 months, (3) exclusions in the warranty, (4) the need for the closers to be checked as part of the 6-monthly recertification process, (5) the system did not function correctly when tested, (6) the installation certificates contain an exclusion related to wind conditions, (7) glazing fracture would expose the curtains to prevailing wind conditions that exceed their operational tolerances. (8) deployment may be delayed if the fire is remote from the detectors, and (9) activation may be delayed due to contra fresh air wind flows.

63 As to (1), Mr Grove's suggestions in relation to the smoke detectors does not carry any probative value and no basis for this opinion in relation to the closers was provided. Matters (2) and (4) are covered by six-monthly inspections, the most recent on 14 March 2022 (6/2644), and will occur by reason of a maintenance agreement dated 20 December 2021 (6/2629).

64 As to (5), the evidence favours the view that any problem encountered by the certifier on 27 August 2021, namely that the windows did not fully close before the curtain descended (5/2281), was addressed before the final report of Holmes dated 2 September 2021 (5/2270) and issue of an Occupation Certificate by the same certifier on 3 September 2021 (5/2282).

65 Matters (3), (6), (7) and (9) relate to wind and glazing, covered below in item 11. Matter (8) is hypothetical: the number of detectors is clearly intended to address this risk by reducing the distance between any potential fire and a smoke detector. Further, the system has been both inspected and certified.

66 In relation to the installation certificate, it is noted that this document was not referred to in Mr Grove's report and was not provided to Mr Harriman until he attended the concave so there was an element of ambush.

67 As to the exclusions contained in the warranty (3/888), a consideration of the periodic inspection and maintenance regime (6/2644) suggests that any defects or damage would be detected by those periodic inspections with the result that the effect of the exclusions is limitation of liability for the cost of repair or replacement as distinct from leaving open a risk of non-performance when needed.

68 The Tribunal is not persuaded that the applicants have made out their case that the closers (ie self-closing windows and doors) on level 3 have materially reduced the fire safety of the building, having regard to the approved installation and periodic maintenance of those closers.

69 Item 11, which was relevant to levels 3, 4 and 5, raised the issue of external wind pressure and glazing. The joint report records that both Mr Grove and Mr Harriman maintained the views expressed in their reports in relation to this item which was said to involve matters of:

- Glazing being in place (flashover fire and breakage)
- Wind pressures …
- Effect of wind pressure on the deployment of curtains
- Wind pressure on the deployed curtains
  Reliability of smoke detectors to deploy curtains prior to flashover/glass breakage

70 As the last of those five matters has already been addressed, it remains to consider the issues of wind pressure and glass breakage. As wind pressure was suggested to be an issue after glass breakage, the question of glass breakage is considered first.

71 Decisions such as *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*) make it clear that, for such evidence to be accepted, the following considerations apply: (1) the expert's opinion must clearly indicate the facts upon which it is based, (2) those facts must be proved so there is a factual basis for the opinion, (3) the reasons or the process of reasoning for the opinion must be disclosed, and (4) any opinion must fall within the qualifications and experience of the expert.

72 In the report of Mr Grove, no adequate process of reasoning is disclosed for how the breakage of window glass will prevent the fire curtains from being deployed. There is a statement that the glass will break if the level of radiant heat exceeds 43 kW/m2 but there is no explanation of how that level of heat would be achieved before a smoke detector causes the fire curtains to descend. Further, after noting (3/158 at [6.1.10]) that the glass used was 10.38mm thick, being a change from 6mm and 6.38mm noted on the architectural drawings due to wind loads, Mr Grove referred to and relied on a test of 6mm thick glass which was said to be able to withstand radiant heat flux of up to 43 kW/m2 for up to 23 minutes which he then compared with the figure of 76.62 kW/m2 in the Holmes report (3/625).

73 As to the wind pressure, Mr Grove refers to a report from a wind engineer which suggests wind pressure on the windows will often be above 30 Pa which is the normal air pressure in a room with ducted air conditioning. However, given that the wind pressure can only become a factor after glass breakage, it

remains difficult to see how wind pressure could become an issue before the fire curtains have descended into their operative position.

74 Of course, the other scenario is that the windows are open at the time of a fire event. In that case, the wind pressure may be expected to be equal on either side of the window glass.

75 Item 12 was described as "*Reduction in fire safety at CC stage*". However, Mr Grove did not provide any additional views under this heading, instead relying on what he said in relation to the items numbered 9, 10 and 11.

76 Accordingly, the joint report does not establish that there is a reduction in fire safety due to the removal of the spandrels and the installation of fire curtains. Support for that view is found in the fact that cl 142 of the EPAR required the certifier to consider whether there is a reduction in fire safety and structural capacity of the building prior to issuing the Construction Certificate which occurred on 4 November 2020. Given the criticisms that the applicants' counsel made of Mr Harriman's evidence, it is noted that items 1 to 6 were agreed, and that the Tribunal's assessment of items 7 to 12 did not require reliance on the opinions of Mr Harriman.

77 Normally, the joint report contains all areas of disagreement between the expert witnesses. However, in this instance the joint report suggested that it only covered the major points of difference (3/873 at [12]). While there were other matters raised during the hearing, it is not necessary to refer to them for the reasons indicated below. Nor is it necessary to further assess either those criticisms of Mr Harriman or the matters referred to above in relation to the evidence of Mr Grove.

Applicant's submissions

78 For the applicant, there were (1) written opening submissions (7/2653), (2) written closing submissions (MFI 4), and (3) oral closing submissions.

79 Despite not having referred to s 106 of the SSMA in the application, the applicant's opening submissions contended that "*Work is needed to restore the fire safety …"* and that such work fell within the statutory duty imposed by s 106. Reference was made to *Walker* at [42], *Krimbogiannis*, and *Doherty*. It

was also contended that special by-law 1 does not authorise the installation of the fire curtains with the reasonable precision that is required by s 108, referring to *BGT* at [134] and [148].

80 A further contention was made that the applicants should not be required to contribute to any special levy needed to fund the work which the applicants' claimed was required. After referring to *Owners Strata Plan No 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387 (*Jacinta*) at [192] – [203], it was suggested that s 232 provided the order-making power not provided by s 104.

81 In these opening submissions the applicants' case was put on the basis that the subject building work was required to comply with the requirements of the BCA and that there was a reduction in fire safety.

82 The closing written submissions for the applicants referred in detail to the Holmes Report then the evidence of Mr Harriman and Mr Grove before contending that the work which included removing the spandrels did not comply with the BCA and was unsafe from a fire safety perspective with the contended result that the respondent should be ordered to carry out rectification work.

83 The legal basis for what the applicants sought was expressed as follows:

> 50. If a building is not in its authorised state, the owners corporation is duty bound to restore it to its authorised state: The Owners – Strata Plan 21702 v Krimbogiannis [2014] NSWCA 411.
>
> 51. The Applicants seeks (sic) Order 1 as set out in our Application, being an order pursuant to section 232 of the Strata Schemes Management Act 2015 (NSW) that the owners restored (sic) the common property to its authorised state.
>
> 52. Further, the Applicants seek an order pursuant to the Strata Schemes Management Act 2015 (NSW) under s 232 or s 229 that the owners corporation take all necessary steps to fund by way of special levy, and complete, those restoration works by 15 December 2021, such that the Applicants are not required to contribute to that special levy.

84 The oral closing submissions for the applicant covered criticisms of Mr Harriman, on the basis that he had a conflict of interest arising from an earlier response to an inquiry from the applicants' solicitor on 19 January 2021 and referred to aspects of the Holmes report and the evidence of Mr Harriman and Mr Grove.

85 In reply it was confirmed that the applicants' case was based on s 106 and submitted that *Doherty* at [153] provided support for the applicants' case. It was also submitted that the situation could be looked at "*through a different lens*" by saying that the absence of a proper by-law under s 108 enables lot owners to reduce fire safety and that a by-law does not shield the respondent from proceedings based on s 106. Reference was also made to s 123 and s 124 of the SSMA in relation to fire safety.

Respondent's submissions

86 Submissions for the respondent comprised (1) written opening submissions (7/2710), and (2) oral closing submissions. The written opening submissions dealt with the applicants' case under three primary headings: (1) reduction in the level of fire safety, (2) non-compliance with the BCA, and (3) whether the works carried out were covered by special by-law 1.

87 It was contended that there was no breach of s 106 which was directed towards maintaining common property and that the applicants sought to go behind approvals that had been obtained.

88 After referring to s 232(7) of the SSMA, it was said that the applicant's claim was a matter falling within the jurisdiction of the Land and Environment Court.

89 As to the evidentiary aspects of the first two grounds, submissions were made as to what was set out in the joint report and reliance was placed on the Holmes report, the report of Mr Harriman, and the certificates issued by the certifier. As to the application of s 106 in this case, reference to the decisions in *Ridis*, *Riley*, *Seiwa*, *Mullen, Doherty,* and *Thoo*. Reliance was also placed on s 106(3), s106(7), and s 144(3) of the SSMA together with Part 5 of special by-law 1.

90 As to the third ground, it was noted that the applicants do not seek any order under any of s 147 to s 150 of the SSMA in relation to special by-law 1 and submitted that, in view of the relief sought by the applicants, the other lot owners should have been joined in the proceedings.

91 Reference was made to the decision in *Veney* at [31]-[32] on the question of how special by-law 1 should be read. After noting there was no challenge to

that by-law in these proceedings, it was contended that, if there was a deficiency, a more reasonable outcome was to amend the by-law so it contained a more specific description. As to the levy issue, it was submitted that s 104 was confined to the costs incurred in proceedings.

92 Additional matters covered in the closing submissions were a reference to *Doherty* at [181] and *Mullen* at [44]. The Tribunal's attention was also directed to the certification and maintenance documents (5/2261-2285).

Consideration

93 In reaching a decision in relation to this application, the Tribunal has considered the entirety of the documents admitted as evidence and the submissions. These reasons focus on the material central to the issues but, to the extent that any evidence or a submission is not referred to, it should not be assumed that evidence or submissions has been ignored.

94 That approach is consistent with what was said by Allsop P in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2]:

> [A] judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving the overall controversy. The need for coherent and tolerably workable reasons sometimes requires a truncation of reference and expression. Judgement writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved …

Special by-law 1 - s 108

95 It is noted that the challenge to special by-law 3 set out in the application was not pursued as that special by-law was repealed on 26 October 2021.

96 Special by-law 1 was not referred to in either the written or oral closing submissions. In the opening submissions, it was contended that the plans and specifications for the fire curtains were not included, and that the respondent was thereby not authorised to undertake that work.

97 Special by-law 1 was introduced on 4 September 2019, amended on 24 September 2020, further amended on 26 October 2021. It was accepted by the applicants that the analysis of this issue must take into consideration those two

amendments with the result it is only final version, registered on 10 December 2021, that needs to be considered.

98 It is necessary to consider the relevant resolutions. First, the 4 September 2019 AGM. The minutes of that meeting (5/2377) record that motion 15.2 was passed. That motion is quoted below:

> A. Repairs and Upgrades
>
> pursuant to sections 106 and 108 of the Strata Schemes Management Act 2015, repair, alter and upgrade the common property Eastern façade of the scheme to carry out the scope of works proposed by PD Remedial Pty Ltd dated 25 July 2019 in accordance with the architectural drawings by Paynter Dixon Constructions dated 27 June 2019, and the supporting documents, drawings and plans attached to this Agenda and marked as "Annexure A".
>
> B. By-Law for [Units] 3, 4, 5 and 6
>
> pursuant to sections 106 and 108 of the Strata Schemes Management Act 2015 to make an additional by-law for the benefit of the Owners from time to time of Units 3, 4, 5 and 6 (the "Owners") in terms of the By-Law attached to this Agenda and marked as "Annexure A".

99 Secondly, the minutes of the general meeting held on 24 September 2020 (5/2425) record the passage of a resolution (motion 2) to update motion 15.2 which was worded as follows:

> A Repairs and Upgrades
>
> pursuant to sections 106 and 108 of the Strata Schemes Management Act 2015, repair, alter and upgrade the common property Eastern façade of the scheme to carry out the scope of works proposed by PD Remedial P/L in accordance with the updated Tender Documents dated 1 September and 9 September 2020 (which supersedes the scope of works proposed by PD Remedial Pty Ltd dated 25 July 2019) and the supporting documents, drawings and plans attached to this Agenda and marked as "Annexure A".
>
> B ...

100 As the respondent's submissions observed, the September 2020 proposals referred to in that resolution contained details of the specified fire curtain product that was used.

101 That 24 September 2020 meeting also resolved to engage relevant consultants, to execute contracts, to set a levy, and to amend Special By-Law 1 (motions 2 to 6 respectively).

102 Thirdly, the special resolution that was passed at a general meeting held on 26 October 2021 (6/2466) was worded as follows (emphasis omitted):

> THAT The Owners – Strata Plan 43487 & 45081 RESOLVES by SPECIAL RESOLUTION to change Special By-Law 1 pursuant to Section 141 & 142 of the of the SSMA by making amendments as follows:
>
> Clause 1(n):
>
> (…)
>
> The "Works" are defined in the Proposal by PD Remedial dated 25 July 2019, the Architectural Drawings by PAYNTER DIXON (Project N. 6636 PRD 01183 Drawing N A-110 Issue (F) – Elevations) and the Izzat Consulting Engineering Plans dated 2710.2020 (Ref J6382) DS01 and attached to this by-law.

103 The Explanatory Note in the notice for that meeting said:

> The amendments to Special By-Law 1 relate only to updating and including the final plans as constructed by Paynter Dixon Remedial ad to reflect the works that have now been completed, signed off and finalised.

104 It was contended, for the applicants, that s 108(2) requires a special resolution to be passed that "*specifically authorises the taking of the particular action proposed*". After referring to *BGT* at [134] and [148], it was submitted that the installation of the fire curtains had not been authorised.

105 *BGT* suggests there should be particularity as to which common property will be the subject of the proposed work. Having considered the resolutions that were passed, and the documents referred to in those resolutions, the Tribunal is satisfied there was sufficient particularity in those resolutions.

106 *Veney* makes it clear that the by-law must be viewed in context and that recourse may be had to surrounding circumstances. It is noted that, in *Tate* at [71], one of the relevant considerations was said to be that common property rights by-laws may be inspected by third persons, such as a prospective lot owner.

107 A consideration what was registered on 10 December 2021 (1/10) reveals:

(1) Special By-law 1 did not just describe the "*Works*" as upgrading the eastern windows, balcony doors, and *"ancillary and waterproofing works*", but also said that such works were defined in the proposal of PDR.

(2) That proposal, which was attached and thus forms part of the publicly accessible record, contains a *"Scope of Works"* on its first page which included the *"Provision of internal fire rated curtains to the high-level glass panels to address the requirements of vertical separation under the Building Code of Australia*."

(3) Special By-Law 4, registered at the same time, related to the operation of the fire curtains.

108 In this case, the Tribunal is satisfied that the work which has been carried out is adequately described in publicly accessible documents. Any person reading the registered copy of Special By-Law 1 would see the definition of the work and thereby be informed that fire curtains were being installed.

109 The applicants have not satisfied the Tribunal that there should be a finding that the work that was carried out was not authorised.

110 For the respondent, it was contended in its opening submissions that, if there was a problem with the contents of Special By-Law 1, it could be amended rather than either removing the fire curtains and reinstalling the spandrels or installing a sprinkler system. Presumably, that submission was based on s 141 of the SSMA which sets out a procedure for changes to by-laws. There was no response by the applicants to this submission, but it is not necessary to deal with this aspect.

Duty to maintain and repair – s 106

111 In relation to s 106, the closing written submissions of the applicants (MFI 4) only submitted: "*If a building is not in its authorised state, the owners corporation is duty bound to restore it to its authorised state*". *Krimbogiannis* was cited in support of that proposition. However, *Krimbogiannis* can clearly be distinguished from the present case which involves changes to the common property which the Tribunal considers, for the reasons set out above, have been authorised by resolutions passed at general meetings of the respondent. That work was also authorised in the sense that it was approved by a certifier who issued an Occupation Certificate on 3 September 2021.

112 The other reasons advanced in support of an alleged breach of the duty imposed by s 106 were that the subject work, that was described during the hearing as removing the spandrels and replacing them with fire curtains, reduced the fire safety of the building and did not comply with the BCA.

113 From what was contained in the joint report, considered above, the Tribunal was not satisfied that there had been a reduction in fire safety. While that joint

report did suggest that it only covered the major points of difference, it is not necessary to refer to the remaining aspects for the reasons indicated below.

114 Further, the experts agreed that, under the provisions of clause 142 of the EPAR, the certifier must consider whether there is a reduction in fire safety and structural capacity of the building prior to issuing the Construction Certificate, which was issued on 4 November 2020.

115 A Construction Certificate would not have been issued without a consideration of whether the work would achieve compliance with the BCA and the fact that an Occupation Certificate was issued on 3 September 2021 provides support for the view that there was compliance with the BCA.

116 In this case, it is noted that Mr Keyworth obtained a peer review of the Holmes Report by Mr Nenadovich, whose move to Queensland was said to have led to his replacement by Mr Grove. That peer review was provided to an officer at Mosman Council who passed it on to the certifier who considered it and responded. The matters raised appears to be those advanced by Mr Grove. As a result, the concerns now raised by Mr Grove appear to have been considered by the certifier in February 2021, well prior to the issue of the Occupation Certificate in September 2021.

117 It must be borne in mind that the primary issue in these proceedings is whether the respondent has breached its duty, imposed by s 106 of the SSMA, to repair and maintain the common property. There is no evidence to suggest any need to repair the installed system, which includes the fire curtains. There is evidence that they have been maintained by a periodic inspection in March 2022, less than a month prior to the hearing, and there is evidence that the respondent has entered into relevant maintenance contracts. Thus, there is no evidence of any event that suggests a breach of s 106 by a failure to repair or maintain.

118 The only potential “trigger” for a breach of s 106 is the report of Mr Grove dated 21 August 2021 which is dated before the Occupation Certificate was issued on 3 September 2021.

119 On the basis that the respondent was not made aware of the report of Mr Grove until after the Occupation Certificate was issued, that report could be said to be a matter which made the respondent aware of a risk or danger of the kind discussed in *Ridis*, but the report of Mr Grove did not, of itself, mean there had been a breach of s 106 that required the fire curtains to be removed and the spandrels reinstalled. The question, in accordance with *Ridis* (and *Doherty* at [181]) is whether the receipt of that report required action and/or investigation by the respondent.

120 The following matters persuade the Tribunal that the respondent's failure to act in response to the report of Mr Grove did not constitute a breach of s 106 of the SSMA by the respondent:

(1) A proper process was followed in relation to the upgrade work of obtaining a proposal which was then discussed by lot owners before a design and construct contract with PDR was executed after which PDR engaged a fire expert resulting in the Holmes Report following which a Construction Certificate was obtained, and the work proceeded.

(2) That process resulted in a Development Consent dated 20 May 2020, three Construction Certificates issued on 4 November and 8 December in 2020 and 9 June 2021, an Occupation Certificate dated 3 September 2021, and a Certificate of Practical Completion dated 18 October 2021.

(3) The 20 November 2020 report obtained by Mr Keyworth from Mr Nenadovich, when received, was referred to PDR then to Holmes for consideration.

(4) Mr de Graaf was appointed to be the superintendent for that work. He said his role was to act impartially as between the respondent and the contractor. His evidence was that both parties acted with "*extreme transparency and good faith*" during the life of the project. He noted that issues were raised by Mr Keyworth. He said: "*I have been onsite to witness how the fire curtains were tested and were operating.*" The evidence of Mr de Graaf was not challenged by cross-examination.

(5) Mr Keyworth had sought to prevent the work from proceeding to completion by contacting Mosman Council and NSW Fire + Rescue but had not been successful.

(6) The concerns of Mr Keyworth were considered by the certifier, and were the subject of a response from him, prior to the issue of an Occupation Certificate.

(7) There was nothing to indicate that the proper processes had not been followed.

(8) The certifier had issued an Occupation Certificate.

(9) Mr Harriman had reviewed the Holmes Report.

(10) Mr Keyworth had evinced a goal of not having fire detectors in his unit, as indicated below.

121 The closing written submissions for the applicants, at [42], contended that the respondent treated the concerns raised by the applicants as an irritation which led to an offer to pay Mr Keyworth $32,000 if he dropped his concerns. That submission does not accurately or completely cover what occurred.

122 To put the relevant documents in context, Mr Keyworth had been provided with the certifier's response to his concerns on 11 February 2021 (4/1126). There was discussion, in a 15 February 2021 document (4/1133) of a variation that was expected to cost $32,000 and, in that document, there was reference to the applicants "*pursuing the smoke detector issue through the council*".

123 In a further document sent two days later, on 17 February 2021 (4/1135), Mr Luby said he believed the other owners would be prepared to contribute so that the applicants would only have to pay $6,400 in order to "*get rid of **the** issue*" (emphasis added), ie the smoke detectors. Understandably, there was an expressed desire to "*get rid of all the issues*".

124 Support for the view that it was the smoke detectors which were the issue is to be found in Mr Keyworth's own evidence that, on 18 February 2021 (the next day), he emailed Mr Luby to say he would not take legal action *"if flame detectors were installed externally at level 3, in lieu of three extra smoke detectors inside Unit 2 to operate the Unit 3 fire curtains*".

125 The position at this time was not so much that the respondent was seeking to buy acceptance of the Holmes report, but that Mr Keyworth was threatening to commence legal proceedings if work proceeded on a basis that would involve the installation of three extra smoke detectors in unit 2. Understandably, there was a desire to resolve that issue, and any other issues that the applicants may raise, with the objective of avoiding the legal costs that would involve.

126 While the respondent's submissions referred to s 106(3), which would render s 106(1) in applicable if certain special resolutions were passed, no reference was made to any such resolution(s).

127 The other matter raised by the respondent was that Part 5 of Special By-Law 1 (7/2684) provides, in cl 18, that "*the Owners are jointly and severally liable for the ongoing maintenance, renew*[al]*, replace*[ment] [of] *the Works."* That wording appears to bring into play s 106(7) which appears to prevent the operation of s 106(1) in relation to the fire curtains and s 144(3) also becomes relevant since it provides:

> To the extent to which a common property rights by-law makes a person directly responsible for the proper maintenance of, and keeping in a state of good and serviceable repair, any common property, it discharges the owners corporation from its obligations to maintain and repair the property under this Act.

128 While this aspect does not appear to have been referred to beyond the respondent's opening submissions, it does appear to provide support for the respondent's case. However, it is not necessary to decide this point.

Settling disputes or rectifying complaints – s 232

129 In *The Owners Strata Plan No 74835 v Pullicin; The Owners Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5 at [73] it was suggested that s 232 does not, of itself, confer order making powers. On appeal, in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 it was decided that there must be a link to a function imposed or conferred by the SSMA to enliven s 232: Leeming JA at [149], accepted by White JA at [165].

130 Accordingly, to provide the power to make an order under s 232 it is necessary for there to be another provision of the SSMA which entitles the Tribunal to make an order of the kind being contemplated. In other words, it is not sufficient for an applicant to say an order should be made because they have a dispute which relates to the operation, administration, or management of a strata scheme. If that was the case, then numerous other provisions in the SSMA would be rendered superfluous.

131 As the Tribunal has determined the applicants do not have any basis under s 106 or s 108, there is no basis for an order under s 232. While *Jacinta* suggests s 232 can be called in aid of s104, there is no basis for an order which relies on that section.

Special levy – s 104

132 The decision in *Jacinta* does suggest that a lot owner could be quarantined by s 104 of the SSMA from damages and not just the costs of proceedings.

133 However, it is not necessary to consider s 104 by reason of what is set out above, ie since the applicants have not satisfied the Tribunal that an order for work to be carried out should be made.

Conclusion

134 While the applicants clearly do not agree with either the resolution for the work, the common property rights by-law, or the completion of the work, these proceedings do not involve a challenge to the resolution(s), the validity of that by-law, or the certification of the work: they involve a claim that the upgrade work was not authorised and involved a breach of the duty imposed by s 106. As the applicants have not demonstrated an entitlement to the relief sought, the Tribunal determines that the application should be dismissed.

Costs

135 As both parties expressed a desire to make submissions as to costs, an opportunity will be provided for that to be done.

Orders

136 For the reasons set out above, the following orders are made:

(1) The application is dismissed.

(2) Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 16 May 2022.

(3) Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 30 May 2022.

(4) Any submissions in reply (not exceeding two pages) are to be filed and served by 6 June 2022.

(5) Any such submissions should indicate whether the party accepts that costs should be determined on the papers, ie without the need for a further hearing.

****

Appendix 1

Chronology

Date	*Details*	*Document reference*
May 12	Mr Keyworth (IK) and Mr Lin purchased lot 8 on level 2	4/890 [1]
22 Sep 15	AGM decided to seek report re possible concrete cancer	5/2287 [10]
Later	Engineer recommended long-term solution, covering both any concrete cancer and outdated, leaking windows	5/2288 [11]
Mar 16	General meeting asked Mr Chrofi to prepare proposal	5/2288 [12]
2017	Proposals of Mr Chofi and Mr Kent not approved	5/2288 [13]
23 Aug 18	Mr McGowan provided a Building Inspection Report	5/2314
25 Jan 19	PDR report provided, containing Options A to E	4/899

04 Feb 19	General meeting decided to proceed with Option E	4/969
Later	Mr Booth of PD attended meeting to discuss the options	4/891 [10]
20 Feb 19	General meeting decided to address concrete cancer and upgrade work to the windows together	5/2354
06 Mar 19	Report provided by PDR	5/2357
08 May 19	Further report provided by PDR	5/2363
26 Jun 19	Investigation report provided by PDR	5/2366
25 Jul 19	Proposal provided by PDR	5/2371
04 Sep 19	AGM held, upgrade work and special by-law 1 approved	1/51
Sep 19	Mr Luby and PDR met with IK and Mr Lin to discuss having “picture frame” windows in their lot on level 2	5/2290 [22]

20 May 20	Mosman Council issued Development Consent	5/1351 [2]
04 Jun 20	Mr de Graaf appointed superintendent for work by PDR	5/1351 [2]
16 Jun 20	Mr Luby's email invited questions re quantity surveyors	5/2541
22 Jun 20	IK sent comments on tender documents to Mr Luby	4/975
26 Jul 20	IK expressed a desire to review the final scope of work, suggested he would need at least 14 days to review them	6/2456
31 Jul 20	Draft report of expert re PDR cost provided to lot owners	6/2250
06 Aug 20	Email advising lot owners of meeting with PDR re proposal cost and seeking any questions they may have	6/2551
11 Aug 20	Report from independent expert re PDR proposal cost	5/2407
18 Aug	Informal meeting discussed that report and PDR cost	6/2529

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24 Aug 20	Copies of proposed contract with PDR sent to lot owners	5/2421
24 Sep 20	General meeting held, contract with PDR approved	4/978
02 Oct 20	Design and Construct contract with PDR executed	5/2290 [26]
13 Oct 20	FER provided by Holmes Fire LP (Holmes)	1/134
04 Nov 20	Construction certificate granted	5/1694
Date	*Details*	*Document reference*
20 Nov 20	Mr Nenadovich wrote to Mr Lin, suggesting external flame detectors as an alternative to smoke detectors in lot 2	4/1095
06 Dec 20	IK asked for certifier to meet with Mr Nenadovich	4/1097
08 Dec	Amended Construction Certificate issued	5/2043

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09 Dec 20	Meeting discussed Nenadovich letter & Holmes response	5/2432
08 Jan 21	Mr Nenadovich provided peer review of the Holmes FER	4/1098
13 Jan 21	Mediation between IK and respondent, with solicitors	5/2435
03 Feb 21	IK met with Mosman Council officer	4/1124
04 Feb 21	IK sought certifier's response to documents he provided	4/1124
11 Feb 21	The cerifier provided his response to IK's concerns	4/1126
15 Feb 21	Mr Luby email to lot owners re issues with IK and PDR	4/1133
17 Feb 21	Mr Luby sent email to IK and Mr Lin with settlement offer	4/1135
18	IK offer: no legal proceedings if flame detectors	4/894 [28]

Feb 21	installed	
21 Mar 21	IK email certifier, replying to his 11 Feb 21 email	4/1138
14 Apr 21	Report prepared by Mr Grove for IK and Mr Lin provided	4/1144
12 May 21	IK's solicitor asked respondent's solicitor for documents	4/1315
14 May 21	IK's solicitor asked PDR for the same documents	4/1318
20 May 21	Holmes issued revised FER	1/180
09 Jun 21	Further amended Construction Certificate approved	5/2196
18 Jun 21	Certifier emailed IK, replying to his 21 Mar 21 concerns	4/1320
20 Jun 21	Reply from IK, raising further questions, and indicating an intention to report the matter to Building Commissioner\	4/1324

24 Jun 21	Reply from certifier	4/1327
26 Jul 21	IK provided photos to Mr Grove and a wind engineer	4/896 [42]
26 Aug 21	The building work was inspected by Holmes	5/1354 [16]
02 Sep 21	Letter provided by Holmes to certifier	5/2270
03 Sep 21	Certifier issued Occupation Certificate	5/2282
26 Oct 21	Special by-law 1 amended and special by-law 3 repealed	6/2473
18 Oct 21	Superintendent issued Certificate of Practical Completion	
Mar 22	Maintenance inspection: all elements* in working order	6/2642
	* including fire curtains and smoke detectors	

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar